No. 224.

Brief of Worthington & Frailey

Office Supreme Court U. S.
FILED
APR 8 1901
JAMES H. McKENNEY, Clerk
D. C.

Filed April 8, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 224.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HOSEA B. MOULTON, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

A. S. WORTHINGTON,
CHARLES L. FRAILEY,
Attorneys for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-6-'01

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 224.

THE DISTRICT OF COLUMBIA, PLAINTIFF IN ERROR,

vs.

HOSEA B. MOULTON, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This was an action for damages for personal injuries to the defendant in error caused by the negligence of the District of Columbia. On Thanksgiving day, November 26, 1896, at about 3 o'clock in the afternoon, the defendant in error started for a drive with his family, which consisted of his wife and her little child, who occupied the front seat of the vehicle with him, his wife's sister and her child, and his wife's mother, all three of whom occupied the rear seat. As the party reached the vicinity of the intersection of Park and Pine streets northwest, driving west along Park street, they approached a large steam roller, which had been left

near the middle of the carriageway on the south side of Park street, a short distance west of Pine (10). About the time that the vehicle reached the middle of Pine street on Park, the horse, frightened by the machine, almost immediately became unmanageable and would not go by it (11). The horse was rearing and backing and seemed to suddenly swing around, and as he so turned around one of the wheels of the carriage was crushed, the vehicle overturned, and the defendant in error was thrown out on Park street, four or five feet east of Pine street, and struck his head and was otherwise very badly injured (12, 13).

It appeared in evidence that the horse attached to the carriage was a gentle one, and had been driven by the defendant in error for three years without accident (10), and even past steam rollers when in operation.

The roller had been used for repairing Park street for some length of time, a week or so (15), but was not in use that day. On the contrary, it had broken down one or two days before Thanksgiving day, and had been left in the position in which the defendant in error saw it on the day of the accident (9, 13). This position was about fifty feet west of Pine street, on the south side of Park street (9–13), which latter street is forty feet wide from building line to building line. As there were about six feet of pavement on each side of the street, the width of the roadway proper was about twenty-eight feet.

On the day before the accident, and also during that day, there had been a large number of horses frightened by the roller as they passed it; in fact, about all the horses that went by showed fright (Sarah Woodland, 13; Emrich, 14). The defendant in error received no warning when he approached the roller, and it did not appear that there were any warning signs to indicate that the roller was a dangerous obstruction in the street. Shortly after the accident—the same evening—the roller was taken away by employés of the District (13). Just prior, however, to its removal and

after the accident to the defendant in error a gentleman drove along and experienced some difficulty with his horse on account of the roller, but a man led his horse by for him (13).

The case was submitted to the jury at the close of the evidence, and they rendered a verdict for $6,450 in favor of the plaintiff below, upon which judgment was entered, and the District thereupon appealed.

On October 11 and 12, 1899, the case was argued in the Court of Appeals (29) by counsel for both sides, and on the 8th of November, 1899, the Court of Appeals affirmed the judgment of the trial court, the opinion being rendered by Mr. Chief Justice Alvey (29).

In the Court of Appeals there were no errors assigned, and no questions of law were argued other than those presented to the court for decision arising from the refusal of the trial court to grant certain instructions requested by the plaintiff in error and from the granting of those asked for by the defendant in error. No error was assigned as having been committed by the trial court in its charge to the jury, and no argument was made to or heard by the Court of Appeals relating to any alleged error committed by the court below in its charge. A copy of the rule of the Court of Appeals relating to assignments of error and a copy of the assignments of error in this case in that court are appended to this brief.

II.

ARGUMENT.

1. *An action will lie against the District of Columbia for injuries resulting from the frightening of a horse by an object negligently placed and suffered to remain by the District of Columbia in one of its streets, provided such an object be naturally calculated to frighten horses of ordinary gentleness.*

That part of the first assignment of error which includes the granting by the court below of the plaintiff's first prayer and the refusal by it to grant the defendant's prayers numbered 10 to 14, inclusive, presents to this court for decision the question whether or not the District of Columbia was liable to the defendant in error for the injuries he sustained because of the frightening of his horse at the steam roller left in Park street.

The rule seems to be that when a municipal corporation permits an object naturally calculated to frighten horses of ordinary gentleness to remain within the limits of a highway maintained by that corporation for an unreasonable length of time, and an accident happens by reason of the fright of a horse at such object, the town or city is liable in an action for damages therefor, even though the object be so far removed from the traveled path as to avoid the danger of collision with it, the plaintiff in such case being, of course, in the exercise of due care.

If this proposition is correct, then there can be no doubt of the right of the defendant in error to recover of the District of Columbia, provided there was no contributory negligence on his part.

The rule just announced is, we submit, amply supported by the great majority of cases decided by the highest courts

of most of the States of the Union. In Hughes *vs.* Fond du Lac, 73 Wis., 380 *et seq.*, the court said:

"It appears from the complaint that while the plaintiff was driving with a horse and carriage, in the evening, along one of the public streets of the defendant city, his horse was frightened at a large wooden roller in the street, became unmanageable, partly overturned the carriage, and the plaintiff was thrown out upon the ground with violence and greatly injured. * * * The facts in this case show that the city created a nuisance on a public street and it is liable therefor upon the same principles as an individual would be for a similar act.

"It is fair inference from the complaint that the roller—which was an unsightly object, naturally calculated to frighten horses—was put and left in the street by the agents and servants of the city. * * * The injury was not caused by an act of nonfeasance, but by malfeasance—doing an act which was wholly wrongful. The injury was produced by its positive act as much as by its neglect."

In Foshay *vs.* Glen Haven, 25 Wis., 288–290, the court below granted the following instruction:

"An object existing within the limits of a highway but leaving the traveled path unobstructed so that the traveler is safe from collision with it, is not an insufficiency in the way merely because it exposes the traveler's horse to become frightened at the sight of it, and the town in such case would not be liable."

The appellate court reversed the trial court, holding this instruction erroneous, and saying:

"We adopt upon this subject the rule established by the supreme courts of Vermont, New Hampshire and Connecticut, that objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such deficiencies in the way as to render a town or city liable, even though so far removed from the traveled path as to avoid all danger of collision."

A case almost identical with the one at bar is Halstead, appellant, *vs.* The Village of Warsaw, 59 N. Y. Supp., 518 (supreme court, app. div., 4th dept.). In that case the plaintiff, with her husband, was driving from the Erie station in the village of Warsaw towards her home. The village authorities had been using a steam roller in leveling and improving the streets. The work had been carried on in the street leading to the Erie station, and after it was finished for the day the roller was left by the roadside, where it was standing as the plaintiff's husband drove down the road from the station to the village.

The machine was about twenty feet long, ten feet high, and eight feet in width, with a smokestack, three rollers, etc., and was covered with a rubber blanket. The street was about three rods in width, and the roller left a space of about two rods for the passing and repassing of teams. As the horse was passing the roller he suddenly shied and veered off. The husband, who was driving, pulled up on him; the bit broke; the horse became unmanageable, and the husband told the plaintiff to jump, which she did, and he himself then got out at the rear of the buggy. The plaintiff was bruised and sprained by her fall. That morning the roller was in the street as the plaintiff and her husband, with two others, went towards the railroad station. The husband of the plaintiff and the ladies alighted from the wagon, and the plaintiff's brother drove the horse past the road machine. The horse shied a trifle, but exhibited no great fright. The horse was gentle, about nine years of age, and the harness was new. The night the accident occurred was not dark. A nonsuit was granted at the close of plaintiff's case. The appellate division, in reversing the trial court, said:

"The nonsuit was error. The street was intended for the public, and while the municipal authorities necessarily were entitled to its use to improve and repair it, they must exercise that use in a way to insure the safety of travelers so far

as compatible with the temporary interference of those intrusted with its care. When work upon the street is suspended for the day, if there is any obstruction to its unrestricted use, then that obstruction should be guarded so it is not a menace to the traveler. If there is an excavation in the street, it must be protected by lights or barricades to apprise the wayfarer of danger. The jury might well say this machine would tend to frighten horses, and, if so, it was incumbent upon those having it in charge to see it was removed from the street when the work was completed for the day. It was left in a narrow street, taking up one-third of its width. It was a place where horses going to and from the railroad station to the evening train must necessarily pass."

Numerous cases may be cited illustrating the great number and variety of objects which have been found to frighten horses, thereby rendering the municipality liable for injuries resulting therefrom. A dead horse in a street caused a runaway, and the municipality was held responsible in Chicago *vs.* Hoy, 75 Ill., 530.

A large rock dug up and left in the traveled way by a city was considered sufficient to support an action for injuries caused by the frightening of a horse by the rock.

Card *vs.* City of Ellsworth, 65 Maine, 547.

Lumber piled on each side of a highway and in the roadway, having been unloaded from railway freight cars, has been held to be such a defect in a highway as to make a township liable for the loss of a horse which had become frightened at the lumber. The court in this case decided that it was settled law that objects ordinarily calculated to frighten roadworthy horses, placed and suffered to remain in a public highway, are sufficient defects to make a municipal corporation liable after due notice; and it also held that, no matter if the lumber was not in the traveled route, the fact that it was on the edges of the highway did not alter the liability of the township, as in either case *the trav-*

eled route was rendered unsafe (North Manheim Township *vs.* Arnold, 119 Pa. State, 389).

A tent standing within the limits of a highway and partly on the traveled path and so constructed and decorated as to be an object of terror to horses was pronounced a nuisance, and the city held responsible for injuries resulting from the fright of a horse thereat, in Ayer *vs.* Norwich, 39 Conn., 377.

Bales of charred hay, unloaded from freight cars and thrown into a highway close to the traveled part of the roadway and suffered to remain by the town several hours after one of the selectmen thereof had due notice, were decided by the court to be sufficient to render the highway unsafe, the same being an obstruction calculated to frighten ordinary horses (Morse *vs.* Town of Richmond, 41 Vt., 435).

A town was held liable for damages resulting from the fright of a horse at a candy machine, consisting of a tripod holding a little pan for boiling candy, and a lamp containing a fire under the apparatus. In this case it was held that the municipality was liable for injuries resulting from the fright of an ordinarily gentle horse at an object likely to frighten such horses, which the city negligently placed or permitted to be placed and remain on its streets.

Town of Rushville *vs.* Adams, 107 Ind., 475.

A steam roller was left in the street of the city of New Haven during the cessation of work thereon from Saturday noon until Monday morning. The roller, though useful to repair the road, was an object calculated to frighten horses. The plaintiff's horse became frightened and injuries resulted. The city was held liable therefor (Young *vs.* City of New Haven, 39 Conn., 435).

A projecting pig-sty was made the basis of a suit for damages due to the fright of the plaintiff's horse at the obstruction and the noises of the pigs, etc. On demurrer the supreme court of New Hampshire held that the action could be maintained on the ground that after notice and a reason-

able opportunity to remove them a town is liable for injuries resulting from the fright of a horse at an object on the highway calculated to frighten horses of ordinary gentleness.

Bartlett *vs.* Hooksett, 48 New Hampshire, 18.

See also a very clear summary of the cases on this point in vol. II, section 1011, Dillon on Municipal Corporations, and note, and II Beach on Pub. Corp., sec. 1513, and cases cited.

The evidence in the case at bar showed clearly that the object at which the defendant in error's horse took fright was one calculated to frighten horses of ordinary gentleness, as at least a dozen horses had passed by it and yet had been scared and had shied (13, 14).

Although there was space to pass it, the roller was within the traveled highway (10, 14). The horse driven by defendant in error was a gentle horse and had not shown fright at steam rollers in motion when driven past them by him. The roller had been placed in the position which it occupied at the time of the accident by the agents of the plaintiff in error, and had been by them suffered to remain there for one or two days prior to the happening of the accident (9), and was removed to a vacant lot (9, 13) within an hour or two after the injury to the plaintiff. This state of facts the jury found to exist, and, that being so, under the foregoing authorities the plaintiff in error, we submit, was liable in the absence of contributory negligence on the part of the defendant in error.

Some question is made in the brief of adverse counsel, at page 20, that the length of time which an object must remain in the highway before the plaintiff in error could be charged with negligence was a question of law for the court, and some authorities are cited supposedly in support of that proposition, but reference to them, we think, will hardly justify that supposition, and no further mention need be made

of them here. Suffice it to say that it is a general rule that what constitutes negligence on the part of one sought to be held for results flowing therefrom is a matter of fact for the determination of a jury—and in this case the unreasonableness of the length of time which the District allowed the roller to remain in Park street was one which the jury were to find under all the circumstances before they could determine the negligence of the plaintiff in error. (See Young *vs.* New Haven, 39 Conn., 435; Ayer *vs.* City of Norwich, 39 Conn., 376.)

The first prayer, therefore, of the defendant in error was properly granted, and the prayers requested by the plaintiff in error numbered 10 to 14, inclusive, were properly refused.

2. *The question of the contributory negligence of the defendant in error was one for the jury, and was properly submitted to them by the trial court.*

The second instruction granted on behalf of the defendant in error and excepted to by the plaintiff in error presents the question of contributory negligence as applicable to cases of sudden danger. The jury were instructed that the law did not require of the defendant in error that he should pursue the safest and best course of action at the time of the accident, but that it did require that he should act as an ordinarily prudent and careful man would have acted under the circumstances.

In the case of Union Pacific Railway Co. *vs.* McDonald, 152 U. S., 262, 281, this court endorsed the doctrine laid down by the New York court of appeals that "persons in sudden emergencies and called to act under peculiar circumstances are not held to exercise the same degree of caution as in other cases." The Court of Appeals of the District

of Columbia has also declared the same doctrine in the case of Railroad Company *vs.* Hickey, 5 Appeals D. C., 436–471.

The eighth and ninth prayers asked for by the defendant and refused by the court are clearly defective and directly repugnant to the law as set forth in the cases just cited. Further, that the roller left in the street, in the manner described by the witnesses, was an obstruction, dangerous and likely to frighten horses, we have already shown, and the authorities cited above in support of the right of the defendant in error to maintain his case uphold the view that it was incumbent upon the plaintiff in error to take the proper precautions to prevent accident. The eighth prayer of the plaintiff in error (19) was clearly erroneous. In all the cases cited on either side in this case in which horses have been frightened by obstructions the statement of the facts indicates that the person injured must have seen the obstruction before the accident, but in none of them is it even suggested that it was contributory negligence not at once to turn back; and in this case the undisputed evidence (13, 14) shows that before the accident occurred out of which this suit arises many other horses had shied at this steam roller, but that all with more or less difficulty had been induced by their drivers to go safely by it. Surely what so many persons did cannot be contributory negligence *as matter of law.*

The ninth prayer asked for has much the same vice as its predecessor. It declares that because the roller was on Park street for the purpose of being used (not that it was *then* being used) in the work of repairing that street it was not an obstruction—a proposition directly opposed to the cases cited in support of the defendant in error's right of action; and, further, it requires the jury to find that the defendant in error was practically blind in order to entitle him to a verdict in his favor.

What is said in the opposing brief by way of argument from the evidence to show that the defendant in error reck-

lessly forced his horse to go on after his fright was apparent was proper enough in the argument to the jury, but cannot avail here. The weight of the evidence was strongly against any such contention.

The roller was about 50 feet west of Pine street, on Park street (9, 10, 11, 14). The defendant in error, testifying in his own behalf, said that when he reached the east line of Pine street the horse seemed in a moment or two to be intensely frightened, and that when he got up to about the middle of Pine street his horse became unmanageable; that then he saw that his horse was badly frightened and could not go by the machine, "but the horse gave him no chance to go back, or turn, or go down Pine street (10)." The witness Turnburke testified that they had reached Pine street when the horse showed symptoms of fright, and that Mr. Moulton tried to control him, but the horse was *terribly frightened in the beginning;* that "*the whole thing took place in thirty or forty seconds,*" and that the horse was badly frightened, and Mr. Moulton "*did not have a chance to do anything at all;*" that he had no opportunity to do anything by way of coaxing or otherwise (11). The witness J. F. Vanfleet testified that the road was peculiar along there, as it sags down on each side, and the plaintiff turned to the right to go by the roller, and the witness noticed the horse commencing to rear and plunge and continue a little further, but not very far. He saw the plaintiff pull on the reins, and the horse was *getting very much frightened at that time:* "*it was all in a moment almost,*" and, as the horse plunged back *almost instantly,* the carriage was turned over (12). The wife of this witness testified that the plaintiff's horse was proceeding quietly until he came within 50 feet of the roller, when the horse seemed frightened and did not care to go by, and "with that the horse reared on his hind legs," etc., and there was a crash, and the wheel was dished under the buggy (12, 13). It therefore appears from the evidence that the fright of the horse and Mr. Moulton's actions with

respect thereto were almost simultaneous with the accident which resulted in his injury, and that instead of the defendant in error attempting to urge his horse past the roller after it had become thoroughly frightened, the contrary happened, and he was not given time to either control the horse or decide upon a plan of action. But the whole question as to whether Mr. Moulton, under these circumstances, did as a reasonably prudent man should do under the same circumstances was passed upon by the jury in favor of the defendant in error, and, we submit, that question was finally concluded by their verdict.

Therefore the first and second assignment of errors are not well taken.

By the tenth prayer of the plaintiff in error, which was refused by the trial court, it was sought to apply in this jurisdiction the doctrine laid down by the supreme judicial court of Massachusetts. The law governing the liability of a municipal corporation in that State for injuries resulting from defective highways is based upon a statute which in that State has been construed to apply only to actual physical defects in the highway and not such as merely cause fright of horses, and that therefore, unless there is actual contact between the vehicle and the defect in the highway and injuries resulting therefrom, no action will lie.

In this jurisdiction this action is based upon the common law and is not governed by any statute. The doctrine announced by the Massachusetts court is, however, not in accord with the great weight of authority, as has been seen in the cases already cited in this brief, and this fact was recognized by the Court of Appeals in its opinion in this case (35). Even in some of the other New England States, where actions of this kind are statutory, as in Massachusetts, the rule announced by that State is not followed (Card *vs.* City of Ellsworth, 65 Me., 547; Ayer *vs.* City of Norwich, 39 Conn., 377; Morse *vs.* Town of Richmond, 41 Vt., 435–440; Bartlett *vs.* Hooksett, 48 New Hampshire, 18).

From the foregoing, it is submitted that the defendant in error had a right to maintain his action, and that he was not guilty of contributory negligence.

Cases Cited upon the Brief of the Plaintiff in Error.

A few remarks will not be out of place concerning some of the authorities cited in the brief filed here on behalf of the plaintiff in error.

In support of their contention that no action is maintainable in such a case as this one, they have cited on page 10 of their brief the case of Sparr *vs.* St. Louis, 4 Mo. App., 572, which appears to be one of the cases in the appendix of that volume under the heading "Statement of points decided in cases not reported."

In Macomber *vs.* Nichols, 34 Michigan, 212, it was held that a steam vehicle had rights on a public highway, as well as horses, and that the question of negligence in the management of it was one for the jury.

The Massachusetts cases cited on the brief of adverse counsel we do not comment upon here, as the Massachusetts doctrine has already been discussed. Counsel quote at some length from the opinion of the court in the case of Nichols *vs.* Athens, 66 Me., 402. They omit, however, to insert a portion of the quotation which reads, "But we think that the circumstances of this case render it very doubtful at least whether the colt (so called by the female plaintiff) was safely adapted to travel on the road." The case was left to the supreme judicial court of Maine to decide it both upon the law and the facts, and they seem to have thought the horse was untrustworthy.

In Kumbo *vs.* Gilham, 103 Wis., 312, a buggy was left on edge within about ten feet of the roadway, but not in the roadway itself. It appeared that the buggy was originally left by the defendant's agent in an upright position, but by some unknown agency had been overturned. The plain-

tiff's horse was frightened by it in the latter position. It was held that the buggy as it had been left originally was not an object likely to frighten horses, but that the defendant (whose son had been driving) was not liable for the act of the unknown agency which turned the buggy up on edge, and it was not reasonable for a person leaving a buggy in its original position ten feet from the road to anticipate that it would be "put in a position likely to frighten horses." This was a suit against an individual. The municipality was not a party.

In Cairncross *vs.* Pewaukee, 78 Wis., 66, the court comments with approval upon Hughes *vs.* Fond du Lac, 73 Wis., 380, cited in this brief, *supra*, and with reference to an obstruction permitted to be in a highway for an unlawful purpose, makes the point that if the steam roller (in Hughes *vs.* Fond du Lac, *supra*) was in use, or being in process of transportation, it was then lawfully upon the highway; otherwise it was not.

In the case of Edgerly *vs.* Concord, 59 New Hampshire, 78, where a stream of water was thrown into a street by a fireman, it was held that the declaration was defective in attributing the injury to the defective highway, when the real cause of action was the act of a fireman throwing water from a hose; and it was also held that the authorities agree that a town is not responsible for damages done by its fire department.

The case of Agnew *vs.* City of Corunna, 52 Michigan, 428, is cited on page 13. The court in that case decided, first, that the statute under which the action was brought applied only to actual defects in the highway, and that objects in the street likely to frighten horses were not such defects; and the court also said that, even if the city was liable for objects likely to frighten horses left in the street, the result of the action depended upon negligence in fact, and, as it had been left in this case to the jury to say whether the stone which had been dug up and left in the highway was a nuisance and whether it had

been allowed to remain a reasonable or unreasonable time, the court could not say, as a matter of law, that it was a nuisance in itself. The jury in this case had found a verdict for the defendant. It also appeared that the municipality had agreed to let a man have the boulder for building purposes and was waiting for him to take it away when the accident happened.

The case of Cain's Administrator *vs.* Ohio Valley Tel. Co., 47 S. W. Rep. (Ky.), 759, was one in which there had been no negligence on the part of the defendant.

In the case of The Board of Commissioners *vs.* Rickel, 106 Ind., 501, cited on page 13 of the opposing brief, it was held that a *county* was not responsible for *defective highways at all*, but only for defective bridges, and that therefore an accident that occurred in the highway by reason of a horse becoming frightened at a plank standing upright on the bridge could not be made the subject of a suit against the county, because the person injured was not at the time actually *using* the bridge.

In Brown *vs.* Mayor, 57 Missouri, 156, cited on page 14 of the brief of counsel for plaintiff in error, the court decided that the proximate cause of the accident in that case was the fact that the driver abandoned the control of his horse.

As to the case of The District of Columbia *vs.* Ashton, cited on page 16 of the same brief, it is quite obvious that it has no application to the case at bar.

Counsel have cited upon the same page of their brief three cases in this court in support of the proposition that one cannot assume a position of danger and then recover for an injury which would not have happened but for such position. The first of these cases, Railroad Co. *vs.* Jones, 95 U. S., 439, was where the plaintiff rode upon the cow-catcher of an engine. The other two cases, Railroad Co. *vs.* Houston, 95 U. S., 697, and Schofield *vs.* Railroad Co., 114 U. S., 615, were cases in which the plaintiffs were injured while walking across a railroad track without looking or listening.

Manifestly these cases do not apply, as the defendant in error did not voluntarily place himself in a position of known danger. That the defendant in error did what a reasonably prudent man would have done under the circumstances was established by the verdict of the jury which had that question before them.

The eighth prayer requested by the plaintiff in error and refused by the court has already been considered on page — of this brief, but on page 21 of the brief of opposing counsel it is made the subject of a special heading in connection with a certain portion of the charge of the court below, and the two together are embodied in and made the subject of the fourth assignment of errors. As we stated at the outset of this brief, counsel for the District in the Court of Appeals neither assigned as error any portion of the charge of the trial court nor made it the subject of argument. The supposed erroneous portion of the charge is made the subject of comment in this court for the first time. How can counsel ask this court to hold that the court below erred as to a matter upon which it expressed no opinion, and which was not presented to it for determination?

Again, this contention is based upon the assumption that there was no evidence in the case as to the failure of the District to provide warning signs night or day. But the bill of exceptions does not purport to contain all the evidence. It states merely (17), "The foregoing being all the evidence as to the nature and circumstances of the accident to the plaintiff." The counsel for the District, evidently not intending to make this point in the Court of Appeals, industriously omitted the evidence which might be held to relate to it. It will not do for them to set up such a claim here under these circumstances.

Finally, there was no error in the charge. The jury were plainly told by the first instruction granted at the request of

the defendant in error (17) what they must find to entitle him to a verdict; and they were told by the second instruction granted at the request of the District (18) that if the defendant's negligence in any degree contributed to the accident he could not recover. The reference of the court to the night-time was merely by way of illustration. The excepted portion of the charge (25, 26) is but a part of what the court said on this subject. After the language excepted to, the court referred further to what might happen at night, and then added: "That would be culpable in the daytime in the same way with horses which are high-spirited."

For all these reasons we submit the judgment below should be affirmed.

A. S. Worthington,

Charles L. Frailey,

Attorneys for Defendant in Error.

APPENDIX.

EXTRACT FROM RULE VIII OF THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA RELATING TO "ARGUMENT OF CAUSES AND THE PREPARATION THEREFOR."

"SEC. 3. The counsel for the appellant shall file with the clerk of the court, at least five days before the case is liable to be called for argument, under the rules of this court, fifteen copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged on the opposite side. Such brief shall contain, *in the order here stated*:

"(1.) A concise statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

"(2.) The assignment of errors relied upon by the appellant, to be separately and specifically stated; and if the supposed error is assigned to the ruling upon the report of an auditor or master, the specification shall state the exception to the report and the action of the court thereon.

"(3.) A clear statement of the points of law or fact to be discussed, with reference to the pages of the record, and the authorities relied on in support of each point."

COPY OF ASSIGNMENT OF ERRORS IN BRIEF ON BEHALF OF THE DISTRICT OF COLUMBIA IN THE COURT OF APPEALS.

"*Assignment of Errors.*

"1. The court erred in granting the plaintiff's first prayer (19), and in refusing to grant the defendant's first prayer (23), ninth prayer (22), tenth prayer (22), eleventh prayer, twelfth, thirteenth and fourteenth prayers (23), because (*a*) the presence of the steam roller in Pine street was not an actionable obstruction thereof; (*b*) no action will lie against the District of Columbia for injuries resulting from the

frightening of a horse by a steam roller at rest in its streets, and (c) the plaintiff was guilty of contributory negligence.

"2. In granting the plaintiff's second prayer (20), because the same was misleading and does not correctly state the doctrine of contributory negligence.

"3. In rejecting the defendant's seventh prayer (22), because the question of a reasonable time under the circumstances was a question of law.

"4. In rejecting defendant's eighth prayer (22), because the object of a warning, sign, or barrier is to give notice; actual knowledge accomplished that object and supersedes the necessity for such notice."